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No. 10-867

IN THE

Supreme Court of the United States

CARL J. MAYER,

Petitioner,

v.

BILL BELICHICK, THE NEW ENGLAND PATRIOTS, and NATIONAL FOOTBALL LEAGUE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents National Football League and The New England Patriots make the following disclosure:

The National Football League has no parent corporation and no publicly held company owns 10% or more of its stock;

The New England Patriots have no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

In what the Petition characterizes as a "highly unusual," "novel and unprecedented" case, *see, e.g.*, Pet. at 6-7, Petitioner Carl J. Mayer seeks review of a decision from the Third Circuit that affirmed the district court's dismissal of Mr. Mayer's complaint for failure to state a claim. Petitioner had filed suit in the District of New Jersey seeking recovery on behalf of a putative class of New York Jets fans who attended Jets home games played against the New England Patriots. The complaint sought, inter alia, punitive damages and recovery of the amounts paid to attend these games, and set forth numerous counts (eight under state law, one under federal law). All of Mr. Mayer's claims were premised on the allegation that the Patriots broke a National Football League ("NFL" or "League") rule when a Patriots employee videotaped Jets coaches and players from the sideline in order to capture the coaches' signals and instructions. While the NFL does not prohibit observing opposing coaches' signal-calling during a game, it does prohibit sideline videotaping of such signal-calling. After conducting an investigation, the NFL found that the Patriots had violated the rule and imposed various penalties against the team and its head coach.

On the motions to dismiss filed by the NFL and the Patriots, the district court made the unremarkable finding – consistent with every other case to address similar claims – that fans attending games cannot state a cause of action against the teams playing the game (or the League) based on a violation of League rules governing the conduct of the sport being played. Pet. App. 34a-35a. The

complaint was dismissed in its entirety without prejudice. No amended complaint was subsequently filed.

The Third Circuit unanimously affirmed, holding that Mr. Mayer "was allowed to enter the stadium and witnessed the 'specified NFL game[s]' between the Jets and Patriots. He thereby suffered no cognizable injury to a legally protected right or interest." Pet. App. at 25a (alteration in original). Setting aside as irrelevant the question of whether Mr. Mayer's game ticket constituted a license or a contract, the circuit court found that, "[a]t best, [Mr. Mayer] possessed nothing more than a contractual right to a seat from which to watch an NFL game between the Jets and the Patriots, and this right was clearly honored." *Id.* at 14a.

The Third Circuit also found that its decision was grounded in important policy considerations – in particular, that a finding in favor of Petitioner would leave the court system overrun by disappointed fans filing similar lawsuits based on alleged "blown call[s]" or rule violations committed by teams on or off the field. *See id.* at 27a. Mr. Mayer's subsequent petition for en banc review was denied.

REASONS FOR DENYING THE PETITION

None of the Petition's six Questions Presented sets forth an issue that warrants this Court's review. Rejecting a sports fan's claims that are premised on a violation of a professional sports league's rules of play is consistent with uniform, settled law as well as logic. Petitioner does not identify any conflict between the Third Circuit's decision and (a) any other circuit court decision; (b) any decision by this

Court; or (c) even any lower court or state court decision. Instead, Petitioner simply seeks to relitigate before this Court the same claims that the district court (as affirmed by the Third Circuit) dismissed below. Petitioner also improperly seeks to raise new arguments that he did not make in the lower courts. The petition for a writ of certiorari should be denied.

I. Petitioner Admits There Is No Conflict Among The Circuit Courts of Appeals

Petitioner does not even attempt to argue that a conflict exists between the Third Circuit's decision and the decision of another circuit court of appeals. Of course, the lack of a circuit court conflict is not surprising given the novel nature of Petitioner's claim. As the Third Circuit noted, "no one in the past has ever brought a legal action quite like this one." Pet. App. at 14a.

In fact, all of the cases that have considered any claims even remotely analogous to Petitioner's lawsuit have reached the same result as the Third Circuit – i.e., that fans may not state a claim based on events, such as purported rule violations, that transpire during a sporting event. *See Bowers v. Fédération Internationale de l'Automobile*, 489 F.3d 316 (7th Cir. 2007) (affirming dismissal of lawsuit brought by fans who attended auto race and claimed race did not include as many cars as required by racing body's rules); *Castillo v. Tyson*, 701 N.Y.S.2d 423 (App. Div. 2000) (affirming dismissal of lawsuit brought by fans who attended boxing match that ended in disqualification when participant bit ear of his opponent in violation of boxing rules). The Third

Circuit found that these cases and "numerous other decisions" have all held that a spectator at a sporting event has no legally cognizable right based on his disappointed subjective expectations as to how that event or game should have been played or officiated. *See* Pet. App. at 24a.

II. Petitioner Does Not Show A Conflict Between The Third Circuit's Decision And Any Of This Court's Decisions

Petitioner concedes that the Third Circuit's decision in no way conflicts with this Court's decision in *Marrone v. Washington Jockey Club of District of Columbia*, 227 U.S. 633 (1913), wherein this Court held that a race track could eject a person even though he had a ticket because he was suspected of having previously "doped" or drugged a horse. *See* Pet. at 22; Pet. App. at 15a. In an opinion written by Justice Oliver Wendell Holmes, the Court stated, "We see no reason for declining to follow the commonly accepted rule," and found that the plaintiff was properly denied admission because the ticket "must be either a conveyance or a license, subject to be revoked." *Marrone*, 227 U.S. at 636-37.

Petitioner here argues for the first time in this litigation that the Supreme Court should "update" this precedent. As a threshold matter, any such argument has been waived because Petitioner failed to raise these issues before the courts below. *See Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984) (citing *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977)) ("Because petitioner did not present this argument to the Court of Appeals, we decline to consider it.").

Even if the Court were inclined to reconsider *Marrone*, this case does not represent an appropriate vehicle to do so. As the Third Circuit rightly pointed out, in contrast to the plaintiff in *Marrone*, Petitioner's individual game ticket was honored; the game simply did not meet his subjective expectations as to how an NFL game should be played. *See* Pet. App. at 16a-17a ("Given that [Petitioner] was never barred or expelled from any game at Giants Stadium, much more is needed to establish a cognizable right . . . .").

Petitioner also fails to identify any conflict between the Third Circuit's decision and this Court's decision in *American Needle, Inc. v. National Football League*, 130 S. Ct. 2201 (2010). *See* Pet. at 23. In *American Needle* this Court examined a narrow issue specific and limited to the federal antitrust laws – viz., whether, with respect to their collective intellectual property licensing, the NFL teams were capable of conspiring under § 1 of the Sherman Act, 15 U.S.C. § 1. *See* 130 S. Ct. at 2208.

None of Petitioner's claims even touches on the federal antitrust laws or the issues addressed in *American Needle*. His only federal law claim was based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, and raised no issues regarding the capacity of teams to conspire under the Sherman Act. *See* Pet. at 28.

III. The Third Circuit's Decision Does Not Conflict With Any Lower Court Case

Petitioner argues that the Third Circuit's decision conflicts with several federal district court cases relating to rights associated with season ticket

packages. Contrary to Petitioner's suggestion, the allegedly "conflicting" lower court cases are reconcilable with the Third Circuit's decision. As the Third Circuit itself noted, some courts have found that a fan's purchase of a season ticket package sold by an NFL team may include certain contractual rights (e.g., the right to a parking pass for that team's home games, the right to renew the season ticket package for the next season). *See* Pet. App. at 19a-20a; *see also Beder v. Cleveland Browns, Inc.*, 717 N.E.2d 716 (Ohio Ct. App. 1998) (examining whether team relocation breached season ticket package holders' alleged contractual right of first refusal to purchase season ticket package for next season); *Brotherson v. Prof'l Basketball Club, L.L.C.*, 604 F. Supp. 2d 1276 (W.D. Wash. 2009) (examining whether team relocation breached season ticket package holders' alleged contractual option to renew season ticket package for next season); *Charpentier v. L.A. Rams Football Co.*, 89 Cal. Rptr. 2d 115, 123-24 (Ct. App. 1999) (finding that season ticket package holder may have claim for fraud where team relocated after knowingly making false statements denying its intention to do so in order to maintain sales of season ticket packages in existing location); *Skalbania v. Simmons*, 443 N.E.2d 352, 354, 358 (Ind. Ct. App. 1982) (noting that season ticket package holders may be entitled to refund of amount paid for alleged breach of contract where team financially collapsed and did not play twenty-seven scheduled home games); *Oshinsky v. N.Y. Football Giants, Inc.*, No. 09-cv-1186 (PGS), 2009 WL 4120237 (D.N.J. Nov. 17, 2009) (examining alleged contractual right of season ticket package holder to renew season ticket package for next season).

However, as the Third Circuit noted, at issue in this case was a "very specific but very different and unusual [alleged] right" based on a fan's subjective expectations as to how NFL games should be played: "namely, the right of a ticketholder to see an 'honest' game played in compliance with the fundamental rules of the NFL itself." *See* Pet. App. at 20a. Dispositively, the circuit found that language on the game ticket itself granted Petitioner only admission for that specific NFL game and did not confer any legally cognizable right as to his expectations with respect to how that game would be played. *See id.* at 24a-25a.

IV. Petitioner's Purported "Conflicts" Relate Only To Issues of State Law, Not Federal Law

While ultimately irrelevant because there are no conflicts, the issues that Petitioner raises all relate to issues of state law. *See* Pet. at 15-19 (discussing *Beder*, 717 N.E.2d 716 ("plaintiffs' claims in contract, fraud and violation of the Ohio consumer protection act"), *Brotherson*, 604 F. Supp. 2d 1276 ("consumer protection statute of Washington state"), *Skalbania*, 443 N.E.2d 352 ("claims for breach of contract, common law fraud, [and] tortious interference with contractual relations"), *Oshinsky*, 2009 WL 4120237 ("contract claim"), as well as, "in the case at bar, claims for tortious interference with contractual relations").[1]

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[1] As noted above, only one of the nine claims in Petitioner's complaint was based on an alleged violation of federal law – i.e., the federal RICO statute. The single

(cont'd)

Thus, the only "conflicts" even asserted rest on issues of state law, and this Court normally does not grant review on such issues – particularly where the circuit court's decision is "altogether reasonable." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 461 (1995); *see also The Wharf (Holdings) Ltd. v. United Int'l Holdings Inc.*, 532 U.S. 588, 596 (2001) ("[W]e ordinarily will not consider such a state-law issue, and we decline to do so here."). Indeed, the "Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop v. Wood*, 426 U.S. 341, 346 (1976) (citing cases).[2]

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paragraph in the Petition that discusses RICO admits that Petitioner seeks merely to relitigate this claim before the Court. Petitioner does not even purport to seek review of any question with respect to RICO's application beyond the facts of this case. *See* Pet. at 28.

[2] Petitioner asserts that these state law issues should have been certified to the New Jersey Supreme Court. Of course, Petitioner chose to bring this lawsuit in federal court and never filed a motion in the Third Circuit seeking certification of any question to the New Jersey Supreme Court. In any event, this Court has routinely declined to consider arguments that have not been developed fully in the record or considered by the circuit court. *See Kosak v. United States*, 465 U.S. 848, 850 n.3 (1984) (citation omitted); *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 772 n.9 (1994) (stating that argument "was not raised below, so we do not address it").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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